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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 188.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT.

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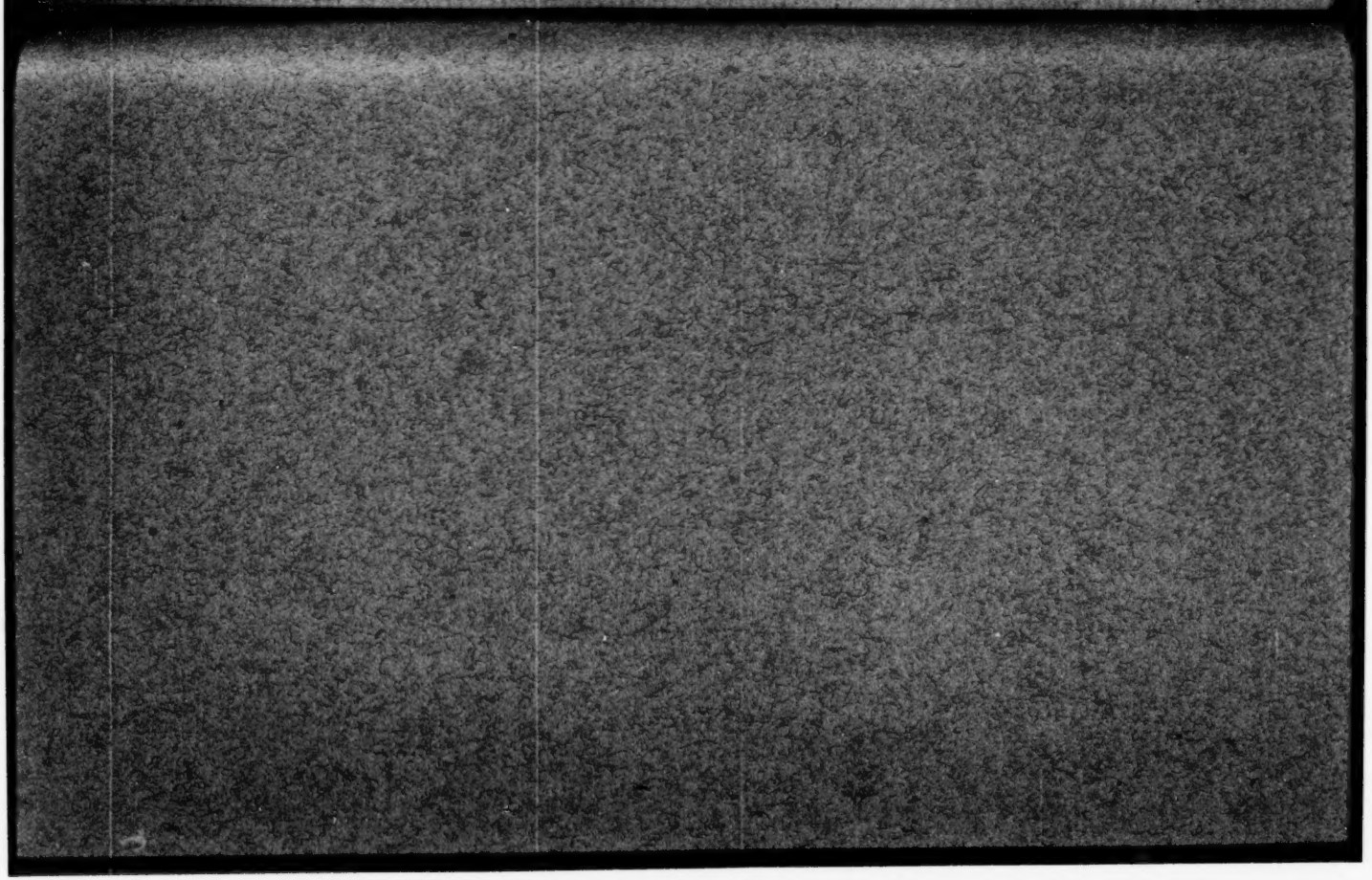

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BRIEF OF APPELLANT.

Statement.

On the 12th day of July, 1871, the Oregon and California Railroad Company received a patent from the United States for the land in controversy (Record, p. 3) which is within the indemnity limits of its grant under the Act of Congress approved July 25, 1866, and entitled "An Act Granting Lands to Aid in the Con-

struction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California to Portland, in Oregon" (14 U. S. Stat., 239). The provisions of this act and the rights of the appellant thereunder are set forth at length in the brief of the appellant in the case of the Oregon and California Railroad Company vs. The United States, No. 186 on the present docket, to which we respectfully refer the Court.

On the 22d day of November, 1853, under the provisions of the Act of Congress approved September 27, 1850, and entitled "An Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey and to Make Donations to Settlers of the said Public Lands" (9 U. S. Stat., 496), and the act amendatory thereof, approved February 14, 1853 (10 U. S. Stat., 158), one John W. Hines duly filed a donation notification embracing, among other lands, the land in dispute (Record, p. 3).

Hines, abandoned the land without residing thereon for four years and without paying therefor (Record, p. 14).

On the 26th day of July, 1894, Congress passed an act (28 U. S. Stat., 122) giving to donation claimants and their heirs, devisees and

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grantees until the 1st of January, 1896, within which to make and file final proofs and fully establish their rights to donations of lands under the acts above-mentioned of 1850 and 1853. Neither Hines nor any descendant or grantee from him took any proceeding under the provisions of the Act of 1894.

After the expiration of the limitation fixed by the Act of 1894 and on the 15th of April, 1897, the government filed its bill in this cause (Record, p. 2) seeking to set aside and cancel the patent for the land in controversy issued to the appellant now more than thirty years ago.

The suit was brought upon the theory that a donation claim filed against the land and then abandoned nearly fifty years ago withdrew the land from selection by the railroad.

On the 29th of May, 1900, a plea to this bill was filed by the railroad company (Record, p. 13) and the cause was heard upon the bill and plea. The plea was overruled and the defendant having declined to plead further a decree was entered canceling the patent issued by the United States for the land in dispute (Record, p. 15).

From this decree an appeal was taken by the railroad company to the United States Circuit

Court of Appeals for the Ninth Circuit, which court on the 16th of May, 1901, affirmed the judgment below upon the authority of Hewitt vs. Schultz, 180 U. S., 139 (Record, p. 20).

From the judgment of the Circuit Court of Appeals the appeal to this court has been taken (Record, p. 21).

Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court entered June 15, 1900, and directing said court to render a decree dismissing the bill of the United States.

II. In deciding that the United States was entitled to a decree vacating and setting aside the patent to the lands in controversy issued to the Oregon and California Railroad Company July 12, 1871.

III. In not deciding that the appellant the Oregon and California Railroad Company was entitled to make the selection of the lands in controversy in 1871 and to receive a patent therefor, upon the ground that the status of such lands, at the time of their selection, determined the right of the railroad thereto, and that at such

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time, the title of said land was in the United States, and that it was then open to selection under the grant of July 25, 1866.

IV. In not deciding that the donation claimant Hines by his failure to reside upon the land for four years or to pay therefor acquired no interest whatever in the land in dispute and that it was public land of the United States and open to selection at the time of its selection by and patenting to the railroad company.

V. In not dismissing the bill of complaint upon the ground that a cancellation of the patent would simply restore the land to the public domain and throw it open to selection by the railroad, and that it was inequitable to cancel a patent more than thirty years old, simply for the purpose of issuing a new patent for the same land to the same patentee.

ARGUMENT.

FIRST POINT.

The land in dispute was public land and open to selection at the time it was selected by and patented to the appellant.

The important question presented in this case is whether the land involved upon this appeal

was in 1871 public land of the United States, open to selection by the railroad, and this question must be answered in the affimative, unless the title thereto was in some way affected by the filing, in 1853, of a donation notification covering the land which was subsequently abandoned.

It is too well settled by the decisions of this court to require discussion that the status of indemnity lands at the time of selection by the railroad is what determines its right thereto (Ryan vs. C. P. R. R. Co., 99 U. S., 388). The condition of the land in the past is of no consequence. The fact that twenty years before, a claimant had an inchoate right which might have developed into a complete and perfect title to the land upon the performance by such claimant of certain conditions, has no relation to the railroad's right of selection, so long as the time for the performance of such conditions by the claimant has long since expired. The right of the railroad depends solely upon the status of the lands at the time of selection unaffected in any way by what might have been if certain contingencies (no longer possible at the date of selection) had taken place twenty years before.

Applying this established law to the facts in

the present case we find that the lands in dispute were clearly open for selection by the railroad in 1871, unless it be that this right was lost by the donation notification filed and abandoned in 1853 nearly twenty years before. Whether the right of selection was thus lost depends upon whether Hines, the notification claimant, acquired by his acts any title to the land, and for an answer to this question it is necessary to refer to the Acts of Congress, under which he made his claim.

By the fourth section of the Oregon Donation Act (9 U. S. Stat., 496), it was provided as follows:

> "There shall be, and hereby is, granted to every white settler or occupant of the public lands * * * *who shall have resided upon and cultivated the same for four consecutive years*, and shall otherwise conform to the provisions of this Act, the quantity of one-half section, or three hundred and twenty acres of land."

The first section of the Amendatory Act of 1853 (10 U. S. Stat., 158), provided that settlers under the former act,

> "in lieu of the term of continued occupation after settlement, as provided by said Act,

> shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the Surveyor-General of said Territory at the rate of one dollar and twenty-five cents per acre for the lands so claimed."

Hines abandoned his notification claim and neither resided upon the land for four years as required by the Act of 1850 nor paid any money for it as provided by the Act of 1853. By the mere filing of his notification claim Hines certainly acquired no title to the land. The grant by its terms was not to anyone who filed a notification claim, *but to one who shall have resided and cultivated the land for four consecutive years.*

In Hall vs. Russell, 101 U. S., 503, the Oregon Donation Act was construed and the conclusion of the court was stated at page 512, as follows:

> "We conclude, therefore, that under sect. 4 there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute

required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will."

In Vance vs. Burbank, 101 U. S., 514, the Oregon act was again construed by this court, and in the course of its opinion the Hall case was referred to as follows at page 520:

"In Hall vs. Russell (*supra*, p. 503), we held that a grant to a settler did not take effect as against the United States, so as to pass anything more than a possessory right in the lands occupied, until the completion of the four years' residence and cultivation, and a full compliance with all the other conditions of the act. The statutory grant was to the settler; but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband. *If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his.*"

Again, in Maynard vs. Hill, 125 U. S., 190, the Act of 1850 was discussed, and it was held that:

> "Under the Oregon Donation Act, 9 Stat., 496, c. 76, the statutory grant took effect as a complete grant only on the termination of the four years' term of residence and cultivation; and the wife of a resident settling under the act as a married man, who was divorced from him after the commencement of his settlement, but before its completion, took no interest under the act in the title subsequently acquired by him. He had, previous to that time, no vested interest in the land, only a possessory right,—a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him."

From these decisions it is clear that Hines by the abandonment of his claim and his failure to occupy the land for the four consecutive years following his entry as required by the statute acquired no title to the land, but the title remained in the United States and the land continued to be part of the public domain. In any event whatever interest in the land (if any) Hines acquired by the filing of his donation notification at once reverted to the government upon his abandonment of the land.

The claim of Hines had been abandoned nearly twenty years before the selection of the land by the railroad. He then had no right under his donation notification for the reason that he had not occupied the land for the four consecutive years which followed the filing of his claim. He had, therefore, no more right or claim to the land when selected by the railroad, than an absolute stranger. He could not file his claim under the act one year, and then five years thereafter go upon the land and live upon it four years consecutively. He would acquire no right to the land by so doing for the reason that the act as we understand it required the residence to be four consecutive years immediately succeeding the filing of the donation claim. Having failed to so reside upon the land, he, therefore, lost all rights to the land as soon as he abandoned his claim and could acquire no further interest in it except by thereafter filing a new donation notification. If, therefore, we construe this law rightly the donation notification of Hines at the time of the selection of the land by the railroad had been canceled years before by his failure to reside upon the land for the four years following the filing of

his claim and could not be revived and he had no more interest in the land than an entire stranger thereto.

The point which we desire to make is well brought out in the case of Hall vs. Russell (*supra*) where the Court said, at page 513:

> "As the law required full four years' residence by the person who claimed the grant, if no provision and [had] been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler if the law authorizing new settlements still remained in force."

If the land became vacant and open for a new settlement by the death of the claimant (except for the provision of the statute as to the rights of his heirs), it would seem to follow that an abandonment of the land by a claimant before the four years' residence would result in leaving the land vacant and open for a new settlement. In other words, the mere fact of abandonment by Hines before the end of the four years restored the land to the public domain, just as if no donation notification had ever been filed.

We, therefore, respectfully submit that the donation claimant Hines acquired no title what-

ever to the land in dispute when he filed his notification in 1853, but merely the right to acquire a title thereto by four consecutive years of residence upon the land immediately succeeding the filing of his notification; that such notification was cancelled by its abandonment by Hines, and his failure to reside upon the land as required by statute, and that the land in 1871, when selected by the railroad, was and had been for a long time vacant public land of the United States open to selection under the grant to the appellant, and the right to make the selection was in no way affected by the donation notification filed and abandoned twenty years before.

SECOND POINT.

The right of the railroad to select the land in dispute was not affected in any way by the Act of Congress of July 26, 1894 (28 U. S. Stat., 122).

It may be argued that the Act of 1894 (Appendix, p. XIV) extended the rights of a donation claimant until the first day of January, 1896. An examination of this act, however, will dis-

close that it gave no right to a donation claimant, except the right to file final proof of a title acquired by four years' residence upon the land, as provided by the statute of 1850. The Act of 1894 did not purport in any way to give any right to a donation claimant or his heirs, in a case where the donation claimant had abandoned his claim and had not resided upon the land the required four years. To put it in another way, the intention of Congress in passing the Act of 1894 was not to enlarge the rights of donation claimants, but simply to permit any claimant who had acquired title to the land by the completion of the required residence but had not for any cause made final proof thereof, to make such final proof before a given day. A mere reading of this act will show that this is all which it purports to permit.

In the last section of this act we find the following provision:

> "Nothing in this Act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said Donation Act, to or in respect of the lands in this act referred to."

This sentence simply means that any adverse claim to the public lands of Oregon which has arisen during the laches and negligence of any donation claimant to make his final proof, shall not be affected by the permission given by the Act of 1894. In other words, negligent and careless donation claimants are given the privilege of filing final proofs, if no other rights, which have grown up during and have been made possible by such negligence, will be affected or impaired thereby.

We, therefore, confidently submit, (1) that the Act of 1894 was never intended by Congress to permit a donation claimant to make his final proof, except one who had acquired a title to the land by residing thereon for four years as required by the Act of 1850, or by paying therefor as provided by the Act of 1853, and that this act was never intended to enable a claimant who had resided on the land for less than four years and then abandoned it, to undertake to perfect his claim; (2) that even if this law should not be given the construction for which the appellant contends and it should be held that a claimant who had not resided upon the land as required by statute could still file his final proofs, yet

even under such a construction the claimant would not be permitted under the last section of the act to make such proof, if by so doing he impaired or affected any claims to the land arising between the time he first settled upon it and the time when he sought to make final proof of his claim.

THIRD POINT.

If the patent to the land in dispute was canceled and the land restored to the public domain, the railroad company would be free to again select it and demand from the United States a new patent therefor. This is a sufficient ground for dismissing the bill.

The indemnity lands under this grant are insufficient to make good the losses within the place limits. Therefore if this land should be restored to the public domain, it would at once be taken by the railroad to make good its losses within the primary limits of its grant. It is hardly the province of a court of equity to direct the entry of a decree which will at once be nullified and properly nullified by the defendant

and the situation of the parties restored to the identical position which existed prior to the commencement of the suit.

In the case of United States vs. Central Pacific R. R. Co., 26 Fed., 479, a bill was filed by the United States to set aside patents for public lands alleged to have been issued by mistake under the same congressional grant as the one now under consideration. The bill was dismissed for the reason among others that, if the patent was canceled, the railroad company would have the right to again select the same identical lands. In the course of the opinion Judge Sawyer said, at page 482, as follows:

> * * * "Now, the only difficulty in regard to this patent is that the selection and patent were *premature*. Had the company waited till after the rejection of the Dias claim before selecting, the selection and patent of identically the same lands would have been good. If this selection and patent fail, the defendant has not yet received all the lands to which it is entitled, and it is still entitled to select an equal amount of outside lands, within the prescribed limits, provided a sufficient quantity of unappropriated lands is left for the purpose. *It does*

not appear that anybody else has acquired any interest in these lands patented, and since they are patented it is not probable that any adverse interest in them has been acquired. If this patent should be vacated, therefore, being no longer sub judice, the defendant would now be entitled to select these identical lands to compensate for the loss, and receive another patent for them. The Dias grant having long since been finally rejected, the lands would be now open for selection, in pursuance of the decision in *Ryan's Case. The result might be only the substitution of another patent to the same lands for the one vacated, at a great deal or further trouble and expense, both to the United States and to the respondent.*" * * *

"The vacation of this patent would involve the necessity of issuing another for the same or an equal amount of other lands, if any there be,—of substituting a new patent for the one vacated. *Courts of equity will not do a vain thing,—will not sustain a bill where no injury results from a mere innocent error in fact or law, upon which it is based,—and especially where that error consists merely in doing a little earlier than it should be done a thing entirely proper to be done at the right time, and which, if now*

undone, must be done over again. 'Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts *which are followed by no loss or damage.*' 1 Story, Eq. Jur., 203. Much less will it interfere where no injury results, and there is only a mutual innocent mistake, there being no moral wrong, and where, to correct the mistake in favor of the party complaining, would be inequitable, and work an injury to the other party. Besides, if these lands are now lost, all others open to selection having at this day been disposed of, by reason of a change of circumstances the parties could not be placed *in statu quo.*" 1 Story, Eq. Jur., 138*a*, 138*c*. * * *

In Germania Iron Co. vs. United States, 165 U. S., 379, Mr. Justice BREWER said at page 384:

> "A court might properly decline to set aside a patent when it affirmatively appeared that immediately after such action, it would be the duty of the department to issue a new one."

In United States vs. San Jacinto Tin Co., 125 U. S., 273, the question was discussed as to when

the United States could file a bill to cancel a patent, and the rule was there stated at page 286 as follows:

> "In short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

We, therefore, respectfully submit that even if the court should hold that the land in dispute was not open to selection in 1871 by reason of the donation notification of Hines, notwithstanding his abandonment of the land twenty years before without residing thereon the statutory period, yet upon the authorities which we have just cited, the bill must be dismissed for the reason that a court of equity will not in the words of Judge Sawyer, do a vain thing and order that to be undone which must at once be done over again, and will not direct the cancellation of a patent and the restoration of the land to the public domain, when the railroad would again select it and become entitled to a new patent therefor.

FOURTH POINT.

The judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

MAXWELL EVARTS,
Counsel for Appellant.

APPENDIX.

Act of Congress, Approved September 27, 1850 (9 U. S. Stat., 496).

CHAP. LXXVI. *An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a surveyor-general shall be appointed for the Territory of Oregon, who shall have the same authority, perform the same duties respecting the public lands and private land claims in the Territory of Oregon, as are vested in and required of the surveyor of lands in the United States northwest of the Ohio, except as hereinafter provided.

SEC. 2. *And be it further enacted*, That the said surveyor-general shall establish his office at such place within the said Territory as the President of the United States may from time to time direct; he shall be allowed an annual salary of two thousand five hundred dollars, to be paid quarter-yearly, and to commence at such time as he shall enter into bond, with competent security, for the faithful discharge of the duties of his office. There shall be, and hereby is, appropriated the sum of four thousand dollars, or as much thereof as is necessary for clerk hire in his office; and the further sum of one thousand dollars

per annum for office rent, fuel, books, stationery, and other incidential expenses of his office, to be paid out of the appropriation for surveying the public lands.

SEC. 3. *And be it further enacted*, That if, in the opinion of the Secretary of the Interior, it be preferable, the surveys in said Territory shall be made after what is known as the geodetic method, under such regulations, and upon such terms, as may be provided by the Secretary of the Interior or other Department having charge of the surveys of the public lands, and that said geodetic surveys shall be followed by topographical surveys, as Congress may from time to time authorized and direct; but if the present mode of survey be adhered to, then it shall be the duty of said surveyor to cause a base line, and meridian to be surveyed, marked, and established, in the usual manner, at or near the mouth of the Willamette River; and he shall also cause to be surveyed, in townships and sections, in the usual manner, and in accordance with the laws of the United States, which may be in force, the district of country lying between the summit of the Cascade Mountains and the Pacific Ocean, and south and north of the Columbia River: *Provided, however*, That none other than township lines shall be run where the land is deemed unfit for cultivation. That no deputy surveyor shall charge for any line except such as may be actually run and marked, nor for any line not necessary to be run; and that the whole cost of surveying shall not exceed the rate of eight dollars per mile, for every mile and part of mile actually surveyed and marked.

SEC. 4. *And be it further enacted*, That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a

declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to wife, to be held by her in her own right; and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon: *Provided*, That no alien shall be entitled to a patent to land, granted by this act, until he shall produce to the surveyor-general of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but, if any alien, having made his declaration of intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs at law, or

pass to his devisees, to whom, as the case may be, the patent shall issue: *Provided, further,* That in all cases provided for in this section, the donation shall embrace the land actually occupied and cultivated by the settler thereon: *Provided, further,* That all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void: *Provided, further, however,* That this section shall not be so construed as to allow those claiming rights under the treaty with Great Britain relative to the Oregon Territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land.

SEC. 5. *And be it further enacted,* That to all white male citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said Territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three; and to all white male American citizens, not hereinbefore provided for, becoming one and twenty years of age, in said Territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provisions of this law, there shall be, and hereby is, granted the quantity of one quarter section, or one hundred and sixty acres of land, if a single man; or if married, or if he shall become married within one year from the time of arriving in said Territory, or within one year after becoming twenty-one years of age as aforesaid, then the quantity of one half section, or three hundred and twenty acres, one half to the husband and the other half to the wife in her own right, to be designated by the surveyor-general as aforesaid: *Provided always,* That no person

shall ever receive a patent for more than one donation of land in said Territory in his or her own right: *Provided*, That no mineral lands shall be located or granted under the provisions of this act.

SEC. 6. *And be it further enacted*, That within three months after the survey has been made, or where the survey has been made before the settlement commenced, then within three months from the commencement of such settlement, each of said settlers shall notify the surveyor-general, to be appointed under this act, of the precise tract or tracts claimed by them respectively under this law, and in all cases it shall be in a compact form; and where it is practicable so to do, the land so claimed shall be taken as nearly as practicable by legal sub-divisions; but where that cannot be done, it shall be the duty of the said surveyor-general to survey and mark each claim with the boundaries as claimed, at the request and expense of the claimant; the charge for the same in such case not to exceed the price paid for surveying the public lands. The surveyor-general shall enter a description of such claims in a book to be kept by him for that purpose, and note, temporarily, on the township plats, the tract or tracts so designated, with the boundaries; and whenever a conflict of boundaries shall arise prior to issuing the patent, the same shall be determined by the surveyor-general: *Provided*, That after the first December next, all claims shall be bounded by lines running east and west, and north and south: *And provided, further*, That after the survey is made, all claims shall be made in conformity to the same, and in compact form.

SEC. 7. *And be it further enacted*, That within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then within twelve months from the time the settlement was

commenced, each person claiming a donation right under this act shall prove to the satisfaction of the surveyor-general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of the commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the commissioner of the general land office, setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said surveyor-general shall return the proof so taken to the office of the commissioner of the general land office, and if the said commissioner shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof.

SEC. 8. *And be it further enacted*, That upon the death of any settler before the expiration of the four year's continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

SEC. 9. *And be it further enacted*, That no claim to a donation right under the provisions of this act, upon sections sixteen or thirty-six, shall be valid or allowed,

if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same; nor shall such claim attach to any tract or parcel of land selected for a military post, or within one mile thereof, or to any other land reserved for governmental purposes, unless the residence and cultivation thereof shall have commenced previous to the selection or reservation of the same for such purposes.

SEC. 10. *And be it further enacted*, That there be, and hereby is, granted to the Territory of Oregon the quantity of two townships of land in said Territory, west of the Cascade Mountains, and to be selected in legal subdivisions after the same has been surveyed, by the legislative assembly of said Territory, in such manner as it may deem proper, one to be located north and the other south of the Columbia River, to aid in the establishment of a university in the Territory of Oregon, in such manner as the said legislative assembly may direct, the selection to be approved by the surveyor-general.

SEC. 11. *And be it further enacted*, That what is known as the "Oregon city claim," excepting the Abernethy Island, which is hereby confirmed to the legal assigns of the Williamette Milling and Trading Companies, shall be set apart and be at the disposal of the legislative assembly, the proceeds thereof to be applied by said legislative assembly to the establishment and endowment of a university, to be located at such place in the Territory as the legislative assembly may designate: *Provided, however*, That all lots and parts of lots in said claim, sold or granted by Doctor John McLaughlin, previous to the fourth day of March, eighteen hundred and forty-nine, shall be confirmed to the parchaser or donee, or their assigns, to be certified to the commissioner of the general land offie, by the surveyor-general, and patents to issue on

said certificates, as in other cases: *Provided further*, That nothing in this act contained shall be so construed or executed, as in any way to destroy or affect any rights to land in said Territory, holden or claimed under the provisions of the treaty or treaties existing between this country and Great Britain.

SEC. 12. *And be it further enacted*, That all persons claiming land under any of the provisions of this act, by virtue of settlement and cultivation commenced subsequent to the first of December, in the year eighteen hundred and fifty, shall first make affidavit before the surveyor-general, who is hereby authorized to administer all such oaths or affirmations, or before some other competent officer, that the land claimed by them is for their own use and cultivation; that they are not acting directly or indirectly as agent for, or in the employment of others, in making such claims; and that they have made no sale or transfer, or any arrangement or agreement for any sale, transfer, or alienation of the same, or by which the said land shall enure to the benefit of any other person. And all affidavits required by this act shall be entered of record, by the surveyor-general, in a book to be kept by him for that purpose; and on proof, before a court of competent jurisdiction, that any of such oaths or affirmations are false or fraudulent, the persons making such false or fraudulent oaths or affirmations shall be subject to all the pains and penalties of perjury.

SEC. 13. *And be it further enacted*, That all questions arising under this act shall be adjudged by the surveyor-general as preliminary to a final decision according to law; and it shall be the duty of the surveyor-general, under the direction of the commissioner of the general land office, to cause proper tract books to be opened for the lands in Oregon, and to do and perform all other acts and things necessary and proper to carry out the provisions of this act.

SEC. 14. *And be it further enacted*, That no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act; and that such portions of the public lands as may be designated under the authority of the President of the United States, for forts, magazines, arsenals, dock-yards, and other needful public uses, shall be reserved and excepted from the operation of this act: *Provided*, That if it shall be deemed necessary, in the judgment of the President, to include in any such reservation the improvements of any settler made previous to the passage of this act, it shall in such case be the duty of the Secretary of War to cause the value of such improvements to be ascertained, and the amount so ascertained shall be paid to the party entitled thereto, out of any money not otherwise appropriated.

Approved, September 27, 1850.

Act of Congress, Approved February 14, 1853 (10 U. S. Stat., 158).

CHAP. LXIX.—*An Act to amend an act entitled "An Act to create the office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to the Settlers of the said Public Lands," approved September twenty-seventh, eighteen hundred and fifty.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who have located or may hereafter locate lands in the Territory of Oregon, in accordance with the provisions of an act entitled "An act to create the office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to the settlers of the said Public Lands," approved September twenty-seven, eighteen hundred and fifty, and of which survey shall have been made or may hereafter be had, in lieu of the term of continued occupation after settlement, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the Surveyor-General of said Territory at the rate of one dollar and twenty-five cents per acre for the lands so claimed, located, and surveyed as aforesaid; and upon the death of any settler before the expiration of the two years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act, up to the time of the death of such settler, shall be sufficient to entitle them to the patent.

SEC. 2. *And be it further enacted*, That upon the payment of money for lands as aforesaid to the said Surveyor-General, he shall issue his certificate of such payment, together with an accurate copy of the survey of the land so located, and purchased, to the purchaser thereof, and upon the filing of which said certificate and copy of survey in the office of the Commissioner of the General Land Office, a patent shall issue therefor as in other cases.

SEC. 3. *And be it further enacted*, That it shall be the duty of the said Surveyor-General to keep and preserve a record of all moneys so received, and to make out and transmit quarterly, to the Commissioner of the General Land Office, an accurate report of the moneys so received by him as aforesaid.

SEC. 4. *And be it further enacted*, That it shall be the duty of the said Surveyor-General, immediately upon the taking effect of this act, to enter into security in the sum of fifty thousand dollars, conditioned for the safe-keeping of all moneys received by him as Surveyor-General, according to law: *Provided, however*, That in order to compensate the Surveyor-General of said Territory for the additional labors and responsibility imposed upon him by this act, in receiving, safe-keeping, paying over, and accounting for the moneys aforesaid, he shall receive two per centum on all such sums which shall include the payment for clerk hire, together with all costs and expenses incidental to such special services in any one year: *Provided*, The salary and percentage of said Surveyor-General, and for clerk hire, shall not exceed four thousand dollars for any one year.

SEC. 5. *And be it further enacted*, That the provisions of the act to which this is an amendment be and the same are hereby extended and continued in force until

the first day of December, eighteen hundred and fifty-five.

SEC. 6. *And be it further enacted*, That every person entitled to the benefit of the fourth section of the act of which this is amendatory, who was resident in said Territory on or prior to the first of December, eighteen-hundred and fifty, shall be and hereby is required to file with the Surveyor-General of said Territory, in advance of the time when the public surveys shall be extended over the particular land claimed by him, where those surveys shall not have been made previous to the date of this act, a notice in writing, setting forth his claim to the benefits of said section, and citing all required particulars in reference to such settlement claim; and all persons failing to give such notice on or prior to the first of December, eighteen hundred and fifty-three, shall be thereafter debarred from ever receiving any benefit under said fourth section. And all persons who, on the first December, eighteen hundred and fifty-three, shall have settled on surveyed lands in said Territory, in virtue of the provisions of the fifth section of the act of which this is amendatory, who shall fail to give notice in writing of such settlement, specifying the particulars thereof to the Surveyor-General of said Territory, on or prior to the first of April, eighteen hundred and fifty-five, shall be thereafter debarred from ever receiving the benefits of said fifth section.

SEC. 7. *And be it further enacted*, That from and after the first of April, eighteen hundred and fifty-five, all public lands within the limits of the townships surveyed or to be surveyed in said Territory, west of the Cascade mountains, which shall not have been claimed under the provisions of the fourth and fifth sections of the act of which this is amendatory, or reserved for public uses by law, or order of the President, and ex-

cepting also mineral lands, shall be subject to public sale and private entry as other public lands of the United States; and so soon as he shall deem expedient, the President of the United States shall, by and with the advice and consent of the Senate, appoint a receiver of public moneys for the Territory of Oregon, west of the Cascade mountains, who shall give bond and security, in the penalty of fifty thousand dollars, for the faithful discharge of his official trust, and whose duties, under the laws in relation to the public lands of the United States in said Territory, shall be the same as those of other like officers of the United States, and who shall be allowed not exceeding five hundred dollars per annum for the safe-keeping and accounting for the public moneys by him received, including all charges for office rent and clerk hire; and at such time as the President of the United States shall deem it expedient, he shall appoint, by and with the advice and consent of the Senate, a Register of the land office for the Territory of Oregon, west of the Cascade mountains, who shall enter into bond, with sufficient security, for the faithful discharge of his official duties, as other like officers, and whose duties and authority, under the direction of the Secretary of the Interior, shall be the same as those imposed by law on other like officers, consistently with the provisions of this act and of the act of which this is amendatory, and whose compensation shall be equal to that allowed to the Receiver of Public Moneys to be appointed under this act; and until such Register shall have been appointed, and entered upon the discharge of his official duties, the Surveyor-General of Oregon shall perform all the duties which shall appertain to such office.

SEC. 8. *And be it further enacted*, That each widow now residing in Oregon Territory, and such others as shall locate in said Territory, whose husband, had he lived, would have been entitled to a claim under the

provisions of the act to which this is an amendment, shall be entitled, under the provisions and requirements of said act, to the same quantity of land that she would have been but for the death of her husband; and that in case of the death of the widow prior to the expiration of the four year's continued possession required by said act, to which this is an amendment, all the rights of the deceased shall inure unto and be vested in the heirs at law of such widow.

SEC. 9. *And be it further enacted*, That all reservations heretofore, as well as hereafter, made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dockyards, ank other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place: *Provided*, That if it shall be deemed necessary, in the judgment of the President, to include in any such reservation the improvement of any settler made previous to such reservation, it shall, in such case, be the duty of the Secretary of War to cause the value of such improvements to be ascertained; and the amount so ascertained shall be paid to the party entitled thereto, out of any money in the Treasury not otherwise appropriated.

SEC. 10. *And be it further enacted*, That the said Surveyor-General, in the discharge of his duties under this act, shall be subject to all the provisions of the act entitled "An act to provide for the better organization of the Treasury, and for the collection, safekeeping, transfer, and disbursement of the public revenue," approved August sixth, eighteen hundred and forty-six; and all acts and parts of acts in conflict with the provisions of this act be and the same are hereby repealed.

Approved, February 14, 1853.

Act of Congress, Approved July 26, 1894.

(28 U. S. Stat., 122).

CHAP. 163. *An act prescribing limitations of time for completion of title to certain lands disposed of under the Act of Congress, approved September twenty-seventh, eighteen hundred and fifty, and the Acts amendatory and supplemental thereto, and commonly known as the "Donation Act," and for the protection of purchasers and occupants on said lands.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where persons under the provisions of the Act of Congress entitled "An Act to create the office of Surveyor-General of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September twenty-seventh, eighteen hundred and fifty, or the various Acts amendatory and supplemental thereto, have made proof of settlement on tracts of land in either of the States of Oregon, Washington, or Idaho, and given notice, as required by law, that they claimed such lands as donations, but have failed to execute and file in the proper land offices a proof of their continued residence on and cultivation of the lands so settled upon and claimed, so as to entitle them to patents therefor, such claimants, their heirs, devisees and grantees shall have, and they are hereby given, until the first day of January, eighteen hundred and ninety-six, the right to make and file final proofs and fully establish their rights to donations of lands under the aforesaid Act of Congress, and no longer; and all claimants who shall fail to make and file final proof and perfect their claims to lands, as donations under the Act aforesaid,

before the said first day of January, eighteen hundred and ninety-six, shall thereafter be held to have abandoned their claims to the lands embraced in their notices: *Provided*, That as soon as practicable after the passage of this Act notices shall be published at least once a week for six successive weeks in one newspaper of general circulation published in the land district, in a form to be prescribed by the Commissioner of the General Land Office, requiring such donation claimants, their heirs, devisees, and grantees, and all persons making claim to such donation claims, to appear and make final proof for such claims within the time herein provided, and that in default of such final proof such donation claims will be held to have been abandoned and the lands embraced therein shall be, and are hereby, restored to the public domain and shall be subject to disposal under the then existing laws providing for the disposition of the public lands: *Provided, further*, That where any such donation claims or any part thereof are claimed by descent, devise, judicial sale, grant, or conveyance, in good faith, under the original claimant, and are, at the date of this Act and for twenty years prior thereto have been, in the quiet adverse possession of such heir, devisee, grantee, or purchaser, or those under whom they claim, such heirs, devisees, grantees, or purchasers, upon making proof of their claims and adverse possession as aforesaid, shall be entitled to patents for the land so claimed and occupied by them: *Provided, further*, That where any portion of any such abandoned donation claim shall have been settled upon prior to January first, eighteen hundred and ninety-four, by any person under an erroneous claim of right and has been used as a *bona fide* residence by such settler where final proof shall not be made by the original claimant, or his heirs, devisees, or grantees, as aforesaid, and such settler has exhausted his or her homestead right, such settler

may, within ninety days from the first day of January, eighteen hundred and ninety-six, file with the register of the land office of the district within which the lands are situate their affidavit and the affidavits of at least two disinterested witnesses establishing the facts of their *bona fide* settlement, occupancy, and improvement of said lands, and pay to the receiver of the proper land office one dollar and twenty-five cents per acre for the land so settled upon, occupied, and improved, not exceeding one hundred and sixty acres, and shall thereupon receive patent therefor.

SEC. 2. That nothing in this Act shall be so construed as to deprive the Commissioner of the General Land Office, under the regulations governing contests in land cases, of his right, if such right now exists, to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when it is proven that such a claim is invalid or abandoned, from canceling the same upon the official records and thereafter disposing of the lands as a part of the public domain: *Provided*, That where hearings are allowed contestants shall pay the expenses incident thereto in the same manner that costs are paid in other contested land entries; and this Act shall not be construed to affect any case now pending before the Land Department in which final proof has been furnished.

SEC. 3. That the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, shall issue the necessary rules and regulations to give full force and effect to the provisions of this Act. Nothing in this Act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said Donation Act, to or in respect of the lands in this Act referred to.

Approved, July 26, 1894.